

DEPLOYING RESERVISTS

WHAT EMPLOYERS NEED TO KNOW

The ongoing crisis in the Balkans has led to the call-up of reservists in the armed forces. Employers, many of whom support the NATO intervention in the former Yugoslavia, may now be surprised to hear their employee announce: "I have orders to leave for Kosovo; I will be back in nine months."

While it may be convenient to replace the activated reservists instead of rehiring them, it is against the law. In fact, many employers are not aware that they are prohibited by state and federal law from discriminating in any way against employees who take time off for active duty in the armed forces.

In 1994, the Uniformed Services Employment and Reemployment Rights Act (USERRA) was signed into law. 38 U.S.C. §§ 4301-4333. USERRA protects all employees who are also reservists in any of the uniformed services, including the Army, Navy, Air Force, Marines and Coast Guard. USERRA applies to all "service in the uniformed services," which includes active duty, active duty for training, and initial basic training. In other words, USERRA applies equally to weekend drills, two-week annual training, and a 270-day overseas deployment. USERRA applies to all employers, including any person or company, the federal government, any state and any agencies or political divisions thereof. Unlike other federal statutes, such as the Americans' With Disabilities Act, USERRA does not contain an exception for small businesses or small employers. *Cf.* 42 U.S.C. § 12111.

USERRA provides that, upon completion of military service, the returning soldier "shall be promptly reemployed." The general rule is that the returning employee is entitled to the position that the person would have achieved had he or she been continuously employed. In other words, the returning soldier is entitled to the same job plus the advancement that would have accrued during the period of active service. In some cases, the employer may provide an equivalent job with similar seniority, status and pay. If, after reasonable efforts by the employer, the employee cannot become qualified to assume the new duties required by the more advanced position, the employee is entitled to his or her original job.

Reemployment may mean that an interim worker will have to be moved or displaced. Employers should advise temporary replacement workers that their jobs are subject to displacement if the returning reservist requests reemployment.

Employers are not obligated to provide reemployment for a returning reservist if "the employer's circumstances have so changed as to make such reemployment impossible or unreasonable." Also, employers are not obligated under USERRA to reemploy where the employment is "for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period." 38 U.S.C. § 4312(d)(1)(C).

USERRA also protects the health, pension and vacation benefits of reservists. A deploying soldier is entitled to continue coverage under a company health plan, but may be required (for deployments longer than 30 days) to pay for the premium under the plan. Returning soldiers who were covered by a company health plan are entitled to immediate reinstatement with no waiting period. 38 U.S.C. § 4317.

With regard to pensions, a person reemployed under USERRA is treated as if he or she never had a break in service. 38 U.S.C. § 4318. Where the plan requires employee contributions, benefits are payable only to the extent that the employee contributes, but the employee has an extended period following reemployment in which to make such contributions. Any discussion of pension benefits is beyond the scope of this article and should be referred to an ERISA specialist.

Employees are entitled, on request, to use their paid vacation for military absences. However, employers cannot force employees to use their vacation or leave time for military duty. Absent service members are entitled to receive the same benefits that would be given to persons who are on furlough or leave of absence. 38 U.S.C. § 4316.

USERRA also requires employers to make reasonable efforts to accommodate the disability of a returning soldier. If the particular job cannot be performed by the injured soldier, the employer must provide the "nearest approximation" to the previous job in view of the limits of the disability. 38 U.S.C. § 4313(a)(3)(B). However, an employer is not obligated under USERRA to reemploy a disabled veteran if such accommodation would "impose an undue hardship on the employer." 38 U.S.C. § 4312(d)(1)(B). An injury or disability will also extend for up to two years the time that the soldier has to give notice after completion of service. 38 U.S.C. § 4312(e)(2).

USERRA also prohibits employers from terminating reservists who have been reemployed after service of more than 30 days. A person reemployed under USERRA shall not be discharged except for cause within one year after the date of reemployment, if the active duty service was for more than 180 days. If the deployment was for more than 30 days but less than 180 days, the prohibition on at-will termination is 180 days. 38 U.S.C. § 4316(c).

In addition to providing the deploying soldier with specific reemployment benefits, USERRA broadly prohibits all forms of discrimination against reservists on the basis of military service. 38 U.S.C. § 4311. For example, an employer cannot terminate or discriminate against an employee who is frequently absent from work due to military training, even if the soldier is not mobilized or shipped overseas. Moreover, an employer cannot discriminate against any other employee who takes any action to enforce or assist in enforcing rights under USERRA. The burden is on the employer to prove that an action is not discriminatory. An employer is deemed to have discriminated against a service member employee if the employee 's service-related activity "is a motivating fact in the employer 's action, unless the employer can prove that the action would have been taken in the absence of such [service-related activity]." 38 U.S.C. § 4311(c)(1).

There are several restrictions on the applicability of USERRA. For example, reservists are limited to a cumulative 5 years of USERRA benefits. 38 U.S.C. § 4312(a)(2). Most deployments, however, will be for a maximum of nine months or less. 10 U.S.C. § 12034(a) (270 day limitation on Presidential mobilization during peacetime). USERRA may not be invoked by soldiers who are separated from service with a dishonorable or bad conduct discharge, or under other than honorable conditions. 38 U.S.C. § 4304. Neither of these restrictions is likely to apply in the case of a normal nine month deployment to the Balkans.

The employee is required to give notice to the employer upon deployment and upon return. Upon deployment, the employee is required to give "advance written or verbal notice" of deployment for active duty, but no notice is required if "precluded by military necessity" or is "otherwise impossible or unreasonable." 38 U.S.C. § 4312(a), (b). Upon return, the amount of notice required from the employee depends on the length of the deployment. For active service less than 31 days, the employee must give notice to the employer on the next workday. For an absence of more than 30 but less than 181 days, the employee must give notice to the employer within 14 days. For active duty service of more than 180 days, the returning soldier must give notice within 90 days. 38 U.S.C. § 4312(e).

The employee who fails to comply with the notice provisions "shall not automatically forfeit such person 's entitlement " to the protections of USERRA. Instead the employee will be subject to the "conduct rules, established policy, and general practices of the employer" with regard to absence from scheduled work. 38 U.S.C. § 4312(e)(3).

Employee service members are also required to provide to their employer, upon request, documentation to their entitlement to the benefits of USERRA, but the

employee cannot be refused reemployment if the documentation is not readily available. 38 U.S.C. § 4312(f).

The enforcement mechanism for USERRA is comprehensive. Soldiers are entitled to assistance from both the Department of Labor and the Attorney General. The employee may also file suit directly in federal district court. Remedies include injunctive relief, reinstatement, compensation for back wages and other benefits, a "liquidated damages" penalty equal to the award of wages and benefits, and attorneys' fees. 38 U.S.C. §§ 4321-4326.

Employers and counsel should also be aware of California Veterans Code § 394, which provides additional protections to reservists. Veterans Code § 394 makes it a misdemeanor to discriminate against reservists in any aspect of employment, and provides for an award of attorneys' fees against the employer who violates the statute.

Together, USERRA and the California Veterans Code provide a comprehensive set of protections and remedies for reservists serving on active duty. Employers and their counsel should ensure that their human resources and labor policies are in compliance with USERRA and Veterans Code § 394, because non-compliance can expose the employer to substantial damages awards, civil and criminal penalties, and attorneys' fees.

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Note from the Presidio of Monterey, California Legal Assistance Office: If you suspect your reservist reemployment rights are being violated, call the agency responsible for ensuring the protection of those rights, the U.S. Department of Labor at (800) 336-4590 or visit its website at <http://www.dol.gov/dol/vets>